Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

ROBERT GIBBONS,

Petitioner,

v.

RICHARD A. SAVAGE, Superintendent
Gowanda Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an unjustified, intentional closure of a courtroom to exclude all spectators, including Petitioner's mother, from the first full afternoon of jury selection in a criminal trial require overturning Petitioner's conviction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

A Memorandum and Order of the United States District Court, Southern District of New York, dated July 13, 2007, *Gibbons v. Savage*, 07 Cv. 3186 (CLB) (Annexed as Appendix B), dismissed Petitioner's 28 U.S.C. §2254 petition for a writ of habeas corpus but granted a Certificate of Appealability. The Second Circuit Court of Appeals' Opinion and Order dated January 28, 2009, affirmed the District Court's judgment. *Gibbons v. Savage*, 555 F.3d 112 (2d Cir. 2009) (Annexed as Appendix A).

STATEMENT OF JURISDICTION

The Court of Appeals entered its Opinion and Order on January 28, 2009. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The Sixth Amendment to the United States Constitution which provides, in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . ."

STATEMENT OF THE CASE

1. Procedural History

Petitioner, Robert Gibbons, was convicted after a jury trial in the County Court, County of Orange, New York, of rape in the third degree, incest, and endangering the welfare of a child. He was sentenced on October 6, 2004, to concurrent indeterminate sentences of 2 to 4 years on the rape and incest convictions and to a concurrent one-year term on the endangering charge. His conviction was affirmed by the New York State Supreme Court, Appellate Division, Second Department, in a Decision dated May 23, 2005. *People v Gibbons*, 18 AD3d 773 (2nd Dept. 2005) Leave to appeal was denied by the New York Court of Appeals on September 28, 2005. *People v Gibbons*, 5 NY3d 828 (2005)

In September, 2006, Petitioner moved the trial court to vacate his conviction pursuant to N.Y.S. Criminal Procedure Law §440.10 on the ground of ineffective assistance of trial counsel. The trial court denied that motion on December 18, 2006, and the Appellate Division, Second Department, denied an application for leave to appeal the trial court's decision on February 23, 2007. Petitioner then filed a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of New York, 07 Cv. 3186 (CLB). By Memorandum and Order, dated July 13, 2007 (Hon. Charles L. Brieant, DJ), the District Court dismissed the petition and issued a Certificate of Appealability on all issues raised. On Petitioner's appeal, the Second Circuit affirmed the District Court's judgment. *Gibbons v. Savage*, 555 F.3d 112 (2d Cir. 2009)

2. The Closure of the Courtroom for the First Afternoon of Jury Selection

At the time of Petitioner's trial, the first phase of "every single" criminal jury selection before Petitioner's trial court part was conducted behind closed doors. Twenty panelists would be seated and questioned in the jury box while the remaining 55 panelists would take *all* of the seats in the spectator section so they could listen to the judge's instructions and questioning and thereby move the proceedings along faster.

Accordingly, at the outset of Petitioner's jury selection, the trial court stated that "although this is an open courtroom, I cannot have spectators during jury selection" because "the courtroom is not big enough." The judge explained that the prospective jurors "take every seat in the courtroom and of necessity a spectator would have to sit right next to a juror and it would be impossible." When defense counsel objected that it was Petitioner's mother who wished to be allowed inside the courtroom, the court replied, "I can't do that. I just don't have room without having people sitting right next to jurors being selected."

Notably, there was no statutory or regulatory requirement that there be a certain number of spectator-panelists in the courtroom during *voir dire*. Had just a single row of seats been cleared for spectators, the result would have been only 5-10 fewer panelists in the courtroom, or about 45-50 spectator-

panelists instead of 55 spectator-panelists.[1] Obviously, the difference of 5-10 spectator-panelists, *who were not being questioned*, did not outweigh Petitioner's fundamental right to a public trial. Nevertheless, over defense counsel's objection that "[i]t's a public proceeding" and that a defendant is at least "entitled to have one family member present", the entire first afternoon of jury selection was closed to the public, including Petitioner's mother.

The selection process began with the trial judge speaking to all of the prospective jurors in the closed courtroom. The judge's introductory remarks covered 10 pages of trial transcripts. Then the few jurors who wanted to speak privately with the court and the attorneys were questioned individually in a separate room and all of those who were excused were excused on consent. This in-chambers process was completed in less than 7 pages of the transcript. After that, the judge and lawyers re-entered the courtroom and the jury selection continued, closed to all spectators, until the end of the day. This part of the jury selection process spanned another 50 pages of trial transcript and included the judge's extensive instructions to, and questions of the prospective jurors on a number of topics, such as the nature and purposes of the indictment, the specific charges contained in the indictment, the nature and purpose of *voir dire*, the differences among civil cases, criminal cases and the

[1] The District Court stated that this was a "small courtroom". But a courtroom in which 75 panelists can be seated is comparable to most state and federal courtrooms in the Southern District of New York.

grand jury with respect to burdens of proof and the presumption of innocence, and the functions and responsibilities of jurors.

On the following day of jury selection, the trial judge acknowledged that a certain number of prospective jurors had been excused the day before and thus permitted Petitioner's mother to be seated in the front row and told the court officers not to put any jurors in that row.

3. The Opinions of the State and District Courts

On Petitioner's direct appeal from the judgment of conviction, the Appellate Division held: "During a portion of *voir dire*, the court, which found that there was insufficient seating available in the courtroom, temporarily excluded the general public and the defendant's mother from the courtroom. Under these circumstances, the court did not deprive the defendant of his right to a public trial . . ." *Gibbons*, 18 A.D.3d at 773. On *habeas* review, the District Court stated that "[t]he extensiveness and nature of the closure in this particular case is minimal to the point of *de minimus*, and should qualify as harmless error." (App. B, pp. 29a-30a).

On appeal the Second Circuit held that "in excluding the only member of the public who sought admission to the defendant's trial, the trial judge failed to satisfy the

requirements of *Waller* [*v. Georgia*, 467 U.S. 39 (1984)]".[2] (App. A, pp. 15a-16a). Specifically, the Court below found that (1) "[t]he principal justifications . . . that all the seats in the spectator section would be taken by members of the venire, and that there was a risk of tainting the jury pool if a potential juror sat next to the defendant's mother" were "not compelling reasons" for complete closure of the courtroom, (App. A, pp. 10a-11a); (2) the "ban on *all* spectators was broader than necessary" since "[t]here were a number of ways the trial court could have kept the proceedings open without the defendant's mother sitting next to a prospective juror," (App. A, p. 12a) (emphasis in original); (3) the trial judge failed to adequately "consider reasonable alternatives", (App. A, p. 12a); and (4) "the [trial] judge's findings did not justify the courtroom closure." (App. A, p. 15a).

Nevertheless, the Court below concluded that the unjustified exclusion of the public from the first full afternoon of Petitioner's jury selection did not require reversal because it did not "subvert" any of the four values furthered by the Sixth Amendment public trial guarantee; to wit, "(1) ensuring a fair trial, (2) reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions,

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[2] Under *Waller*, a courtroom closure must satisfy the following four conditions: "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller*, 476 U.S. at 48.

(3) encouraging witnesses to come forward, and (4) discouraging perjury." (App. A, p. 20a), *citing Peterson*, 85 F.3d at 43 (citing *Waller*, 467 U.S. at 46-47). The Court gave two reasons to support this conclusion.[3] First, that "[e]ven if the trial judge had not excluded Gibbons's mother from the courtroom, she would not have been able to watch a significant portion of what occurred during that afternoon session because the private interviews of individual jurors as to their reasons for inability to serve were justifiably conducted in an adjacent room out of the hearing and sight of the other jurors." (App. A, p. 21a).[4] Second, that

> nothing of significance happened during the part of the session that took place in the courtroom. The judge read the indictment, asked questions of a few jurors, and provided administrative details on what the jurors should expect if chosen. No prospective jurors were excused except with the consent of both parties. No peremptory challenges were made, and no objections were asserted by either party to anything that occurred. The next morning, when voir dire resumed, Gibbons's mother was allowed to watch the proceedings.

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[3] The Court below correctly observed that the third and fourth values "are not implicated by voir dire because no witnesses testified". (App. A, pp. 20a-21a).

[4] The Court's choice of description, "significant portion", is surprising, since the "private interviews" took less than 7 pages of transcript while the in-court proceedings, which Petitioner's mother *could* have viewed had she been permitted in the courtroom, spanned 60 pages. (App. A, p. 21a).

(App. A, p. 21a). Thus, the Second Circuit held that the trial judge's violation of *Waller* was "too trivial" to warrant overturning Petitioner's conviction:

> Although the closure was not justified, we conclude upon examination of all the details of what occurred, that event was too trivial to warrant the remedy of nullifying an otherwise properly conducted state court criminal trial. We need not rule on the metaphysical question whether, in view of the triviality of the incident, it was not a deprivation of a constitutional right, or in contrast, it was a violation of a constitutional right, but, in spite of the inapplicability of the harmless error rule, too trivial to justify vacating the state court's judgment.

(App. A, pp. 21a-22a).

REASON FOR GRANTING THE PETITION

1. The Unjustified Courtroom Closure Requires "Automatic Reversal"

It is firmly established that the denial of a public trial in contravention of *Waller* constitutes a "structural error", *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006), to which a harmless error analysis may not be applied. *Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991). Structural defects "defy analysis by 'harmless-error' standards" because they "affect the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Gonzalez-Lopez*, 548 U.S. at

148-149, *quoting Fulminante*, 499 U.S. at 309-310; *see, also Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) ("unlike trial rights, structural rights are "'basic protection[s]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function").[5]

In general, a structural error "requires automatic reversal," *Washington v. Recuenco*, 548 U.S. 212, 218 (2006), because such error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United State*, 527 U.S. 1, 9 (1999). An error may also be deemed "structural" because of "the difficulty of assessing the effect of the error." *Gonzalez-Lopez*, 548 U.S. at 149, fn 4. The specific "violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance[.]" Gonzalez-*Lopez*, 548 U.S. at 149, fn 4, *quoting Waller*, 467 U.S. at 49, n. 9.[6]

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[5] In addition to "using difficulty of assessment as the test" for determining structural error, this Court has "also relied on the irrelevance of harmlessness[.]"*Gonzalez-Lopez*, 548 U.S. at 149, fn 4, *citing McKaskle v. Wiggins*, 465 U.S. 168, 177, n. 8 (1984) ("Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis").

[6] *See, also In re Oliver*, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an (Cont'd)

The Court below held, however, that the unjustified exclusion of the public from the first full afternoon of Petitioner's jury selection does not require "automatic reversal", *Recuenco*, 548 U.S. at 218, because, even though Petitioner is not required to show prejudice, he must still demonstrate how the unjustified closure "subverted" a Sixth Amendment value. According to the Second Circuit, then, when this Court declared in *Recuenco* that structural errors "require automatic reversal" it did not really mean "automatic" because the rule against "harmless error" analysis does not include "trivial error" analysis.

The Second Circuit's holding cannot withstand logical scrutiny. If (1) an unjustified courtroom closure is a "structural error" and thus "necessarily render[s] a criminal trial fundamentally unfair", and (2) one of the four Sixth Amendment values furthered by the public trial right is "ensuring a fair trial"[7], then (3) an

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(Cont'd)

effective restraint on possible abuse of judicial power."); *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) ("Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.").

[7] This Court in *Waller* explained the meaning of the first of the four Sixth Amendment values — "ensuring a fair trial" — as follows:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . .

Waller, 467 U.S. at 46 (internal quotation marks omitted).

unjustified courtroom closure "necessarily" subverts the Sixth Amendment values of "ensuring a fair trial."

As this Court noted in *Waller*, "[e]ssentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that . . . jurors will perform their . . . functions more responsibly in an open court than in secret proceedings[.]" Waller, 467 U.S. at 46, fn 4, *quoting Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). There is no reason why this view does not hold as true for jury selection as it does for any other part of the criminal trial.

Thus, the untenable distinction between "harmless error" and "trivial error" is really no distinction at all and signifies nothing more than the Second Circuit's disagreement with this Court's holdings in *Waller* and *Neder* that an unjustified courtroom closure, by virtue of its being a structural error, "necessarily renders a criminal trial fundamentally unfair." By applying a "trivial error" analysis after finding that a courtroom closure failed each and every *Waller* condition, the Second Circuit has essentially added a *fifth* condition which leads to the same slippery slope that this Court intended to prevent by prohibiting "harmless error" analysis. If, for example, an unjustified closure of jury selection for a half day is "trivial", then what about a full day?

2. The Decision Below has created a Split among the Circuits

In *Owens v. U.S.*, 483 F.3d 48, 61-66 (1st Cir. 2007) (not cited by the Court below), Owens' criminal trial was allegedly closed to the public for the first day of jury selection in order to make room for the jury pool. The district court concluded that "the trial closure was not sufficiently prejudicial to warrant relief." *Owens*, 483 F.3d at 61. On appeal, the First Circuit reversed, rejecting the Government's argument that this was a "trivial, inadvertent courtroom closure." *Owens*, 483 F.3d at 62, *quoting Bowden v. Keane*, 237 F.3d 125, 129 (2d Cir.2001). The Court of Appeals explained that "this was not a mere fifteen or twenty-minute closure; rather, Owens' trial was allegedly closed to the public for an entire day while jury selection proceeded" and that "[j]ury selection is, of course, a crucial part of any criminal case." *Owens*, 483 F.3d at 63, *citing Gómez v. United States*, 490 U.S. 858, 873 (1989) ("Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice . . . or predisposition about the defendant's culpability. . . ."). The *Owens* Court observed that "the cases on this issue are clear: 'once a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way. The mere demonstration that his right to a public trial was violated entitles a petitioner to relief.'" *Owens*, 483 F.3d at 63. *Quoting Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir.2001). Thus, the First Circuit "conclude[d] that if the trial court barred spectators from the courtroom as Owens allege[d], he was denied his Sixth Amendment right to have a public trial." *Owens*, 483 F.3d at 63.

In explaining "the logic of this conclusion", the *Owens* Court pointed out that

> [i]t is possible that jurors might have been more forthcoming about biases and past experiences if they had faced the public. It is also possible that Owens and the Government might have picked a more impartial jury or asked different questions with local citizenry watching. All of these possibilities call into question the fundamental fairness of Owens' trial. Requiring that Owens prove any of them by a preponderance of the evidence would be a burden impossible to meet.

Owens, 483 F.3d at 65.

Owens is indistinguishable from the case at bar. There is no constitutional difference between a day's closure and a half day's closure of jury selection. The very same "possibilities" that "call into question the fundamental fairness of Owens' trial" also call into question the fundamental fairness of Petitioner's trial.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JANUARY 28, 2009

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: October 16, 2008
Decided: January 28, 2009)

Docket No. 07-3306-pr

ROBERT GIBBONS,

Petitioner-Appellant,

—v.—

RICHARD A. SAVAGE, Superintendent Gowanda Correctional Facility,

Respondent-Appellee.

Before:

MCLAUGHLIN, LEVAL, POOLER, *Circuit Judges.*

Petitioner-Appellant Robert Gibbons appeals from a judgement of the United States District Court for the Southern District of New York (Brieant, *J.*) denying his petition for habeas corpus pursuant to 28 U.S.C. § 2254, seeking to overturn his New York State conviction for

rape, incest, and endangering the welfare of a child. Gibbons claims that he is entitled to retrial because (1) he was deprived of his right to a public trial guaranteed by the Sixth Amendment, (2) he was denied a fair trial due to juror misconduct, (3) the receipt in evidence of tape-recorded conversations between Gibbons and his daughter violated his due process rights, and (4) he was denied effective assistance of counsel. The last-mentioned claims have no colorable merit; we discuss them only briefly. On the other hand, his claim of denial of the right to a public trial raises serious questions which call for some discussion. Although the trial court's decision to exclude the only spectator (the defendant's mother) on the first afternoon of jury selection was unjustified and the rule of harmless error is not applicable to denial of the right to a public trial, we nonetheless conclude that the incident was too trivial to require overturning the conviction.

BACKGROUND

Petitioner Robert Gibbons was convicted after a jury trial of Rape in the Third Degree, Incest, and Endangering the Welfare of a Child. Each of these offenses was based on his having had sexual relations, including intercourse, with his fifteen-year-old daughter. He was sentenced on October 6, 2004 to 2 to 4 years imprisonment on the rape and incest convictions, to run concurrently with a 1-year sentence of imprisonment on the endangering charge.

Appendix A

The trial evidence showed the following: After Gibbons and his wife divorced in 1992, Gibbons retained visitation rights to his son and daughter who continued to live with their mother. On October 2, 1999, Gibbons picked up his daughter from a school event, brought her to his home, and had sexual relations with her, which included intercourse. Gibbons drove his daughter home and implored her not to tell her mother.

Three years later, the daughter told her mother. The mother reported this incident to the police who began an investigation. As part of the investigation, the police placed a recorder on the daughter's telephone and had her contact Gibbons. The tape recorder did not function on the first call. The daughter called again, and this call was captured on the recorder, with the exception of the beginning of the conversation.

Two days later, Gibbons agreed to answer questions about the incident at the police barracks. After *Miranda* warnings, the officers asked Gibbons about the incident. Gibbons responded by saying "yeah, I fucked my daughter." (It was disputed at trial whether the response was intended as an admission that he had done so or was spoken sarcastically to ridicule and deny the charges). The officers continued to ask Gibbons questions and eventually arrested him for the rape of his daughter. Soon thereafter, he said, "It was mutual, I didn't rape her. Did she say this was mutual. I didn't rape her." Gibbons was then indicted on the charges described above.

Appendix A

I. Voir Dire and Public Trial

Jury selection was conducted over several days, beginning in the afternoon of the first day. Before allowing prospective jurors to enter the courtroom, the trial judge closed the courtroom to all spectators, and expelled the only spectator, who was Gibbons's mother. The judge said, "[A]lthough this is an open courtroom, I cannot have spectators during jury selection." As explanation, the judge added that because of the small size of the courtroom, the large number of prospective jurors, and the court's desire not to have jurors in close proximity to spectators, closure to spectators was required. Defense counsel objected, telling the court that the lone spectator was Gibbons's mother, and arguing that Gibbons was entitled to a public proceeding. In response, the judge said that he was not "going to taint the entire jury pool," which would happen if he "put a relative right next to a potential juror." Defense counsel suggested that Gibbons's mother could sit in the well of the courtroom directly behind counsel. The judge rejected that solution, stating that "[n]o one goes in the well unless it's their attorneys or part of the defense team." The judge expressed concern that such an arrangement would cause a security problem and would make the jurors wonder who was sitting there. It was simply "going to cause more problems." The court adhered to its ruling, and refused to allow spectators in the courtroom for that afternoon's jury selection proceedings.

During that afternoon session of the jury selection proceedings, the judge gave general instructions to the prospective jurors and asked if anyone had family emergencies that would prevent them from serving. Together with the prosecutor, defense counsel, Gibbons, and a court reporter, the judge went into an adjacent room to talk privately with each prospective juror who claimed inability to serve. Several jurors were excused with the consent of both parties. After the conclusion of those private hearings with individual jurors, the judge addressed all the prospective jurors in the courtroom, reading the indictment and explaining the duties of jurors. The judge also questioned individual jurors as to whether they could be impartial. Upon the conclusion of this questioning, several prospective jurors were excused, in each case with the consent of both parties.

The next day, as the dismissal of some of the jurors on the first day had left some vacant seats in the spectator section of the courtroom, the judge opened the courtroom to the public, allowing Gibbons's mother to attend the remainder of the proceedings, during which Gibbons was tried and convicted.

II. Appeal and Collateral Attack

On direct appeal to the New York Supreme Court, Appellate Division after his conviction, Gibbons asserted, among other claims, a violation of his Sixth Amendment right to a public trial. The court affirmed his conviction, reasoning that there was insufficient seating for all prospective jurors, and therefore the trial court's

decision to exclude the public temporarily was not a violation of Gibbons's right to public trial. *People v. Gibbons*, 18 A.D.3d 773, 795 N.Y.S.2d 700, 701 (2005). Leave to appeal was denied by the New York Court of Appeals. *People v. Gibbons*, 5 N.Y.3d 828, 804 N.Y.S.2d 42, 837 N.E.2d 741 (2005) (Rosenblatt, J.).

After his unsuccessful attempt to overturn his conviction in the New York trial court pursuant to C.P.L. 440.10 on the ground of ineffective assistance of counsel, Gibbons filed his petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the district court. Judge Brieant denied the petition, but issued a Certificate of Appealability (COA), because, in his view, reasonable minds could disagree "with respect to the total effect of all these issues on the conviction." *Gibbons v. Savage*, No. 7:07 Civ 03186 (S.D.N.Y. July 20, 2007).

DISCUSSION

This Court reviews a district court's decision to grant a habeas petition *de novo*. *Hemstreet v. Greiner*, 491 F.3d 84, 89 (2d Cir.2007). A federal court cannot grant habeas corpus overturning a state conviction with respect to a claim adjudicated on the merits in a state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In addition, the writ may be granted in certain limited circumstances not pertinent to this claim by reason of erroneous fact finding. *Id.* § 2254(d)(2).

On appeal, Gibbons contends that the rulings of the state trial and appeals courts on his claim of denial of a public trial represent an unreasonable application of clearly established federal law determined by the Supreme Court.

I. Public Trial Right

The right to a public trial is guaranteed by the Sixth Amendment and incorporated against the States by the Fourteenth Amendment. *See Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). The defendant has a right to an open, public trial, including during the jury selection. *See Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 509-10, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*) (holding that the press and public have a First Amendment right to attend voir dire); *Waller*, 467 U.S. at 46, 104 S.Ct. 2210 (explaining that the Sixth Amendment right to a public trial is at least as broad as the First Amendment right to a public trial recognized in *Press-Enterprise I*). As the Supreme Court recognized in *Press-Enterprise I*, the proceedings for the selection of the jury are an important part of the trial process. 464 U.S. at 505, 104 S.Ct. 819; *see also United States v. Sayeedi*, 903 F.2d 88, 91 (2d Cir.1990) ("Jury selection is a 'critical stage of the criminal proceeding' " (quoting *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989))).

The defendant's right to public trial is not absolute, but there is a "presumption of openness." *Press-*

Enterprise I, 464 U.S. at 510, 104 S.Ct. 819. To overcome this presumption and justify closing the courtroom to the public during a criminal proceeding, the Supreme Court has outlined four elements that must be satisfied:

> [(1)] the party seeking to close the [proceedings] must advance an overriding interest that is likely to be prejudiced,
>
> [(2)] the closure must be no broader than necessary to protect that interest,
>
> [(3)] the trial court must consider reasonable alternatives to closing the proceeding, and
>
> [(4)] the trial court] must make findings adequate to support the closure.

Waller, 467 U.S. at 48, 104 S.Ct. 2210.

Gibbons argues that the People must satisfy even a higher burden than *Waller* imposes because of the importance our Circuit and the Supreme Court have placed on having family members and friends attend trial. It is true that, in dictum, the Supreme Court has noted a "special concern for assuring the attendance of family members of the accused" at the trial proceedings. *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir.1994) (citing *In re Oliver*, 333 U.S. 257, 271-72 & n. 29, 68 S.Ct. 499, 92 L.Ed. 682 (1948)). Previous opinions of this court have relied on this Supreme Court dictum to note that the exclusion of family members "is not a step to be taken

lightly." *Guzman v. Scully*, 80 F.3d 772, 776 (2d Cir.1996); *see also Carson v. Fischer*, 421 F.3d 83, 91 (2d Cir.2005) (explaining that the "Court takes very seriously" the right to have family present at trial). However, the Supreme Court's decision in *Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006), interpreting § 254(d)(4)'s phrase "as determined by the Supreme Court," bars reliance on Supreme Court dictum, much less on circuit court precedents that extend Supreme Court holdings, as a basis for overturning state convictions under § 2254. *Rodriguez v. Miller*, 537 F.3d 102, 109 (2d Cir.2008). In *Rodriguez*, we held that the precedent to apply in deciding whether a courtroom closure violated the defendant's right to a public trial is the Supreme Court's decision in *Waller*. *Id.* As neither *Waller* nor any other Supreme Court holding acknowledged the appropriateness of a different standard for the exclusion of family members than for the exclusion of the general public, an inferior court may not justify a grant of habeas corpus relief under § 2254 by reference to such a heightened standard. *Id.*

A. The Proceeding Was Closed Within the Meaning of the Sixth Amendment

The People argue that there was no "closure" within the meaning of the Sixth Amendment because limiting access to a courtroom is within the trial court's discretion. The People cite to several cases, including *United States v. Shryock*, 342 F.3d 948 (9th Cir.2003) and *People v. Colon*, 71 N.Y.2d 410, 526 N.Y.S.2d 932, 521 N.E.2d 1075 (1988), arguing that they support the

proposition that a "closure" does not occur when the trial court places limitations on how many people can enter the courtroom. The cases cited by the People stand for the limited proposition that no single member of the public has a right to gain admittance to a courtroom if there is no available seat. That is, so long as the public at-large is admitted to the proceedings, the Sixth Amendment does not guarantee access to unlimited numbers; the fact that a particular individual is not admitted does not constitute a violation of the Constitution.

The thrust of these cases is not applicable here. The public was categorically excluded. (The trial judge stated, "I cannot have spectators during jury selection.") This is not a case where some members were allowed to attend, but there was not sufficient room for others. We conclude that, when the trial judge ordered the courtroom closed to all spectators, the courtroom was closed within the meaning of the Sixth Amendment. To evaluate whether the closure was justified, we use the *Waller* standard.

B. *Waller*

Under *Waller*'s first prong, a closure is not justified absent an "overriding interest" that supports it. 467 U.S. at 48, 104 S.Ct. 2210. The principal justifications offered by the court were that all the seats in the spectator section would be taken by members of the venire, and that there was a risk of tainting the jury pool if a potential juror sat next to the defendant's mother. These

were not compelling reasons. Even if the number of prospective jurors equaled or exceeded the number of seats in the spectator section of the courtroom, that was not sufficient justification to eject the only spectator from the courtroom. There were many ways of accommodating a single spectator, which might have been explored, including allowing either the sole spectator or a prospective juror to stand until seats became vacant when potential jurors were excused, or, as discussed further below, temporarily placing the lone spectator in another part of the courtroom. Absent some indication that the defendant's mother might communicate improperly with members of the venire, the mere fact that some might be in close proximity to her did not raise a meaningful risk to "taint the entire jury pool," as the judge suggested. *See People v. Taylor*, 244 Ill.App.3d 460, 183 Ill.Dec. 891, 612 N.E.2d 543, 548-49 (1993) (holding that where there is no evidence of a reasonable likelihood that a defendant's family member would attempt to influence the jurors during voir dire, the trial judge's statement that he wanted to prevent "contamination" of potential jurors did not satisfy *Waller*'s "overriding interest" test).

Furthermore, even if maintaining distance between the defendant's mother and the prospective jurors amounts to an overriding interest in preventing proximity, the People must satisfy *Waller*'s second prong-that the action must be no broader than necessary to protect the overriding interest. 467 U.S. at 48, 104 S.Ct. 2210. The court's ruling to ban *all* spectators was broader than necessary to preserve that

separation, which could have been accomplished in an alternative fashion. There were a number of ways the trial court could have kept the proceedings open without the defendant's mother sitting next to a prospective juror. Among them, the trial judge could have:

- Accepted defense counsel's suggestion to have Gibbons's mother sit behind counsel, or in some other part of, the "well;"

- Called fewer jurors at the start, leaving some room for spectators;

- Required either a member of the venire or Gibbons's mother to stand until a seat became vacant; or

- Moved the proceedings to a larger courtroom-an option the court considered on the second day of voir dire.

Under *Waller*'s third prong, the trial court must consider reasonable alternatives to closing the proceedings. *Id.* We assume that, for purposes of a defendant's after-the-fact effort to set aside his conviction on the basis of exclusion of the public, the defendant may not rely on possible alternatives that no one suggested at the time. There is good reason not to allow the defendant to sandbag the trial judge by refraining from suggesting an alternative to closure at the time, but later relying on that alternative as one the trial court was compelled to consider. The only

alternative expressly suggested or expressly contemplated at the time was defense counsel's suggestion to allow Gibbons's mother to sit temporarily in the well, which is normally reserved for counsel and parties. Even with respect to this suggestion, we do not believe the trial judge satisfied the requirement of *Waller*.

Recognizing that the precise words of *Waller* were that the court is obliged to "consider reasonable alternatives," *id.*, we do not think the obligation is discharged if the court *considers* a reasonable alternative but then unreasonably rejects it. The obligation to "consider reasonable alternatives" seems to us to imply an obligation to accept the alternative when it would be reasonable to do so and unreasonable to refuse to do so.

While the trial court did literally "consider" the alternative suggested by the defendant of allowing the defendant's mother to sit in the well until more space became available in the spectator section, the court gave no respectable reason for refusing to adopt it. What the court said in explanation of its rejection of the suggestion was that "no one goes in the well unless it's their attorneys or part of the defense team." The judge added that it would cause a security problem and would make jurors wonder who was sitting there.

These were not adequate reasons for rejecting a reasonable alternative to closure of the courtroom. As for the proposition that "no one [except attorneys] goes

in the well of the courtroom," nowhere is it written that this is an immutable rule. It is commonplace for trial judges to use parts of the well temporarily to accommodate a venire that overflows the spectator section or to accommodate spectators in exactly these circumstances. All that was needed was the judge's authorization.

What security problem the trial court had in mind (that might arise from seating the defendant's mother in the well) was not identified. While the defendant, without a doubt, was charged with a serious offense, this was not the trial of Osama bin Laden. There was no apparent reason for special concerns of safety or security. If the court's unexplained concern was that the defendant's mother might pass to her son some item of contraband, this could easily have been prevented in a variety of ways. The People did not claim at trial that any security interest would be compromised if the defendant's mother were temporarily seated in the well. Nor have the People suggested in their brief to this court any legitimate security concern which necessitated excluding the defendant's mother from the well.

As for the court's second reason-that prospective jurors might wonder who she was-we do not understand what difference it would make if the jurors wondered who was the lady sitting in the courtroom, or indeed even if they speculated that it might be the defendant's mother. We see no reason to believe the prospects of a

fair trial would have been jeopardized by the jurors' speculation or realization that the defendant's mother was attending the trial. It was foreseeable at the time of the jury selection, furthermore, that the defendant's mother would continue to attend trial sessions. Jurors would see her in the spectator section of the courtroom day after day as the trial progressed and in all likelihood might ask themselves who she was. The possibility that members of the venire might speculate on the same question a few days earlier during jury selection was not a reasonable justification for excluding the only member of the public who sought to be present.

While a federal court reviewing a petition for habeas corpus which contests the actions of a state trial judge in administering the courtroom should surely be deferential, we find that no reasons of even arguable validity were given for refusing to adopt the reasonable alternative which defense counsel suggested to the trial judge. Unreasonable rejection of a reasonable alternative does not satisfy the prong of *Waller* which requires the trial judge to "consider reasonable alternatives." 467 U.S. at 48, 104 S.Ct. 2210.

As to the fourth prong, which requires the trial court to make findings adequate to support the closure, for the reasons explained above, the judge's findings did not justify the courtroom closure. We therefore conclude that in excluding the only member of the public who

sought admission to the defendant's trial, the trial judge failed to satisfy the requirements of *Waller*.[1]

C. Do Trivial Exclusions Require Overturning a State Conviction

We recognize that the violation of a defendant's right to a public trial is not justified by a finding that the error was harmless. *Waller*, 467 U.S. at 49-50 & n. 9, 104 S.Ct. 2210; *Guzman v. Scully*, 80 F.3d 772, 776 (2d Cir.1996). If it were, little or nothing would remain of the right because the presence or absence of public spectators rarely, if ever, will affect the result of a trial, at least in a manner that is perceptible.

The Supreme Court has divided court errors in criminal trials into two categories: trial errors and structural errors. *See Arizona v. Fulminante*, 499 U.S. 279, 307-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Trial errors are those to which the harmless error analysis applies. *Id.* at 307-08, 111 S.Ct. 1246. By contrast, structural errors are those to which the harmless error analysis does not apply, as they are deemed to render a criminal trial fundamentally unfair. *See Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165

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1. In affirming his conviction on appeal, the Appellate Division said nothing more than that the insufficiency of seating available in the courtroom justified exclusion of the public, including Gibbons's mother. *Gibbons*, 795 N.Y.S.2d at 701. As we explained above, this finding was not an adequate reason justifying the trial court's decision to expel the only spectator who sought admission.

L.Ed.2d 466 (2006); *Neder v. United States*, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The errors identified by the Supreme Court as falling in the "structural" category are denial of counsel, *see Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), a biased trial judge, *see Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), racial discrimination in the selection of the grand jury, *see Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), the denial of the right of self-representation, *see McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the denial of the right to trial by jury by giving a defective reasonable-doubt instruction, *see Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), and the denial of a public trial, *see Waller*, 467 U.S. at 49, 104 S.Ct. 2210.

As the nomenclature devised in *Fulminante* implies, "structural" errors ordinarily relate to fundamental rights involving the structure of the trial. When a criminal trial is conducted in a manner that renders it fundamentally unfair by depriving the defendant of a fundamental structural right, reversal of the conviction is ordinarily automatic. *Recuenco*, 548 U.S. at 218, 126 S.Ct. 2546; *Neder*, 527 U.S. at 8, 119 S.Ct. 1827. It appears beyond doubt that a defendant required to stand the full trial, or a substantial or important part of it, without the assistance of counsel would have his conviction reversed without inquiry into whether the error was harmless, and that the same result might well apply to one who, in spite of his demand to represent

himself, was required to be represented by counsel throughout the trial, or for a substantial or important part of it. *See Gideon*, 372 U.S. at 342-43, 83 S.Ct. 792; *Faretta v. California*, 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). It does not necessarily follow, however, that every deprivation in a category considered to be "structural" constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation.

Suppose, for example, that in a lengthy, multi-defendant trial, three months into trial, for a few minutes after a luncheon recess, trial proceeded without the judge being aware that the attorney for one of the defendants had not yet returned to the courtroom. Assume that the evidence received during those few minutes had nothing to do with the temporarily unrepresented defendant's complicity, and that upon counsel's tardy return a few minutes later, counsel reviewed the evidence received in his absence and advised the court that, while he objected to the trial having been conducted in his absence, he had no objection to any of the evidence. Trial then continued for another several months. We very much doubt, notwithstanding the brief "structural" deprivation for an inconsequential portion of the trial, that the Supreme Court would require that the conviction be vacated.

Similarly, in the context of a denial of the right of public trial, as defined in *Waller*, it does not follow that

every temporary instance of unjustified exclusion of the public-no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure-would require that a conviction be overturned. Again, suppose that during some colloquy, the court ill-advisedly decided to exclude the public from the courtroom, but after a couple of minutes of hearing inconsequential discussion by counsel, recognized its mistake, and re-opened the courtroom. The contention that such a brief and trivial mistake could require voiding a criminal trial of many months duration seems to us unimaginable. Whether the explanation would be that so trivial an exclusion did not constitute a violation of the Sixth Amendment, or that there was a violation but too trivial to justify voiding the trial, we do not know. But we believe that, regardless of which explanation would be given, the result would be to allow the conviction to stand. We must speculate because the Supreme Court has never ruled on such a question.

In *Peterson v. Williams*, 85 F.3d 39 (2d Cir.1996), our court declined to vacate a conviction in spite of an unjustifiable, temporary courtroom closure, notwithstanding that it occurred during an important part of the proceedings, where the closure occurred without the awareness of the judge as the result of an administrative malfunction. *Id.* at 42. At the start, for security reasons, the public had been *justifiably* excluded and the door locked during the testimony of an undercover narcotics agent. After the conclusion of the undercover agent's testimony, however, as the result

of an administrative oversight, the courtroom remained locked while the defendant testified. The mistake was brought to the attention of the trial judge only after the defendant completed his testimony. *Id.* at 41-42. Recognizing that the harmless error standard did not apply, we nonetheless ruled that the closure was too trivial to require that the conviction be vacated. *Id.* at 41-44.

In evaluating whether a closure is trivial, we look to the values the Supreme Court explained were furthered by the public trial guarantee, focusing on (1) ensuring a fair trial, (2) reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury. *Peterson*, 85 F.3d at 43 (citing *Waller*, 467 U.S. at 46-47, 104 S.Ct. 2210). Essentially, our analysis turns on whether the conduct at issue "subverts the values the drafters of the Sixth Amendment sought to protect." *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir.2006). In the odd circumstances of *Peterson*, we concluded that they did not, notwithstanding that the inadvertently extended closure occurred during one of the most important portions of the trial.

D. The Incident Was Too Trivial to Justify Overturning Gibbons's Conviction

Reviewing the public trial values in relation to this case, we conclude that the closure was too trivial to justify vacating Gibbons's conviction. The third and

fourth values derived from *Waller* and articulated in *Peterson* are not implicated by voir dire because no witnesses testified. These values, therefore, do not weigh either in favor or against a triviality finding. As to the first and second values, in the particular circumstances of this case, limiting presence at the voir dire proceedings to only the attorneys, judge, defendant, and prospective jurors for one afternoon did not subvert these values. Even if the trial judge had not excluded Gibbons's mother from the courtroom, she would not have been able to watch a significant portion of what occurred during that afternoon session because the private interviews of individual jurors as to their reasons for inability to serve were justifiably conducted in an adjacent room out of the hearing and sight of the other jurors. Further, nothing of significance happened during the part of the session that took place in the courtroom. The judge read the indictment, asked questions of a few jurors, and provided administrative details on what the jurors should expect if chosen. No prospective jurors were excused except with the consent of both parties. No peremptory challenges were made, and no objections were asserted by either party to anything that occurred. The next morning, when voir dire resumed, Gibbons's mother was allowed to watch the proceedings.

Although the closure was not justified, we conclude upon examination of all the details of what occurred, that event was too trivial to warrant the remedy of nullifying an otherwise properly conducted state court criminal trial. We need not rule on the metaphysical

question whether, in view of the triviality of the incident, it was not a deprivation of a constitutional right, or in contrast, it was a violation of a constitutional right, but, in spite of the inapplicability of the harmless error rule, too trivial to justify vacating the state court's judgment.

II. Gibbons's Other Claims

Gibbons raises three additional claims, none of which have merit.

First, he argues that his Sixth Amendment rights to confrontation and a fair trial were violated by "misconduct" of a juror who influenced other jurors by giving his expert opinion on the authenticity of a tape recording. The county court held a hearing pursuant to Gibbons's motion to set aside the verdict, heard the testimony of jurors, and denied Gibbons's motion, finding in part that testimony of the juror who reported the impropriety was "completely incredible" and that Gibbons had failed to show by a preponderance of the evidence the facts necessary to support his claim. This conclusion does not constitute an unreasonable determination of the facts.

Second, Gibbons argues that his right to a fair trial was violated by the trial court's refusal to suppress a tape-recorded conversation between Gibbons and his daughter in spite of a gap in the recording. The New York courts held that there was no error because the People laid a proper foundation for the admission of the tape, further stating that the existence of a minor gap

in the tape went to the weight of the evidence, not admissibility. We see no problem in the New York courts' determination. *See People v. Torres,* 136 A.D.2d 664, 523 N.Y.S.2d 893, 895 (1988); *see also People v. Ely,* 68 N.Y.2d 520, 527, 510 N.Y.S.2d 532, 503 N.E.2d 88 (1986). Gibbons's daughter and a police officer who was a contemporaneous witness to the recorded conversation testified to the fact that the tape recording accurately reflected the conversation. Gibbons lacked no opportunity to cross-examine or otherwise challenge the evidentiary foundation for the tape. In any event, Gibbons did not raise a federal constitutional challenge to the admission of the tape recording before the New York Appellate Division, and therefore did not preserve the argument for habeas review. *See Castille v. Peoples,* 489 U.S. 346, 351, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989).

Finally, Gibbons argues that he was denied his right to effective assistance of counsel based on the failure of counsel to: (1) effectively impeach Gibbons's daughter's credibility; (2) obtain her psychiatric and therapeutic history; and (3) put Gibbons on the witness stand during trial. The New York courts disagreed. To prove ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Actions and/or omissions taken by counsel for strategic purposes generally do not constitute ineffective assistance of counsel. *Id.* at 690-91, 104 S.Ct. 2052. Gibbons has not shown that his counsel's decisions were anything other than strategic.

Nor has he shown that different choices would have had any likelihood of altering the outcome of the trial, especially in view of the powerful evidence of his guilt. Therefore the state court's decision was neither contrary to, nor an unreasonable application of, federal law.

CONCLUSION

We affirm the judgment of the district court.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JULY 16, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

07 Cv. 3186 (CLB)

ROBERT GIBBONS,

Petitioner.

- against -

RICHARD A. SAVAGE. Superintendent, etc.

Respondent.

Memorandum and Order

Brieant, J.

Before this Court for consideration is the counseled Petition of Mr. Robert Gibbons, a New York State prisoner who seeks a writ pursuant to 28 U.S.C. § 2254 setting aside his conviction in the County Court of Orange County on October 6, 2004. Following a jury trial, Petitioner was convicted of Rape in the Third Degree. Incest and Endangering the Welfare of a Child. The Petitioner describes sexual activities with his fifteen year old daughter as "consensual." However, she was by statute incapable of consenting and the consensuality was aided by the ingestion of alcohol.

Appendix B

The incident occurred on October 2, 1999 in Orange County. The parents of the fifteen year old daughter (hereinafter the victim) were estranged and living apart. Her mother had custody and the father had visitation rights. He picked up the daughter from a sporting event at the high school and had intercourse thereafter at his residence. Later that same evening, the victim told her girlfriend, but she did not report the incident to the police or her mother until December 1, 2002.

Counts Two and Four of the Indictment were dismissed prior to trial. Following the customary pretrial proceedings and trial, on November 8, 2003, the jury returned a verdict convicting the Petitioner of all three remaining counts.

Thereafter, and prior to sentencing, Petitioner moved to set aside the verdict based among other things on claims of juror misconduct. The Court held an evidentiary hearing on May 13, 2004 on that issue and issued a written decision on August 2, 2004 denying the motion to the extent that it was based on juror misconduct, and a further decision in writing was issued on September 2, 2004 denying the balance of the motion.

On October 6, 2004. Mr. Gibbons was sentenced to concurrent indeterminate terms of two to four years for Rape and Incest and one year on the remaining misdemeanor count, all to run consecutively to an unrelated case under Indictment 2004-033 *(People v. Gibbons*, 27 A.D. 3d 483 – leave denied. 6 N.Y. 3d 894 (2006)).

Appendix B

The Petition in this case alleges the following grounds for relief: (1) that Petitioner's right to a public trial was violated: (2) that the misconduct of Juror No. 6 violated Petitioner's right to a fair trial and his right of confrontation; (3) that the trial court should have suppressed an incomplete tape recording and by failing to do so violated the Petitioner's right to a fair trial; (4) ineffective assistance of trial counsel.

The conviction was affirmed on direct appeal. *People v. Gibbons,* 18 A.D. 3d 773 (2005) and leave to appeal was denied by the New York Court of Appeals on September 28. 2005 (*People v. Gibbons,* 5 N.Y. 3d 828 (2005). Motions to Vacate were denied on January 18, 2006 by Judge DeRosa and on February 23, 2007, the Appellate Division denied leave to appeal. This Petition was filed on April 20, 2007 and is timely. Exhaustion of state remedies appears to have been accomplished. The Court now considers each of the separate grounds relied upon.

Public Trial

The trial was conducted in a small courtroom. The trial judge announced on the first day of jury selection that no spectators could be in the courtroom because there were insufficient seats for the jury panel and a spectator would have to sit next to a juror. This exclusion of spectators included Petitioner's mother. The judge insisted that the exclusion was standard practice because the spectator section holds sixty persons but seventy-five panelists are required. On the second day

of jury selection, after the size of the panel had been reduced by excusals, the judge permitted the Petitioner's mother to be seated alone in the front row. Petitioner's counsel preserved his objection. Under the procedure being followed, the first day was largely ministerial and did not involve the exercise of peremptory strikes.

On direct appeal, the Appellate Division responded to this contention as follows:

> During a portion of the *voir dire,* the court which found that there was insufficient seating in the courtroom, temporarily excluded the general public and the defendant's mother from the courtroom. Under these circumstances, the court did not deprive the defendant of his right to a public trial (citations omitted).

It does seem that it would have been possible to have allowed some members of the public including family of the defendant to remain in the courtroom, without intermingling with the jurors. The jurors alone exceeded the lawful capacity of the courtroom under the fire code. A number of jury panelists apparently were standing during the early part of the selection proceedings. Regardless of what might have been, there was really nothing substantive being accomplished in the first day, except the purging of the panel for generalized excuses. Specifically, no disputed challenges for cause were ruled upon and no peremptory strikes were exercised. Obviously, no testimony was being taken.

Appendix B

This Court perceives this Constitutional violation, if any there be, to be minimal and hypertechnical. New York courts have held that there is discretion to temporarily limit access to the courtroom in order to limit overcrowding, to accommodate limited seating capacity and preserve order and decorum. *People v. Valentin,* 250 A.D. 2d 494 (1st Dept. 1998); *People v. Colon,* 71 N.Y. 2d at 416. This case is factually distinguishable from cases where judges exclude the public or members of the defendant's family while testimony of a particular witness is being received, or where something else of a substantive nature is being accomplished. Petitioner relies on *English v. Artuz,* 164 F.3d 105 (2d Cir. 1998), a case in which the trial court was closed because a substantive witness said he feared for his life and was afraid that a co-defendant of English or his family would cause him to be murdered. Petitioner quotes *English* for the proposition that the doctrine of harmless error does not apply in circumstances involving unwarranted exclusion of a defendant's family members; doing so justifies *habeas corpus* relief, and petitioner need not show prejudice. See *English* at p. 108 of 164 F.3d 105. This would seem to be *dictum* and internally inconsistent. The exclusion occurred during a highly significant testimonial portion of the trial. The same opinion also holds, citing *Ayala v. Speckard,* 131 F.3d 62 (2d. Cir. 1997) (*en banc*) that "the more extensive is the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest," thereby implying that where closure is minimal and occurs during a relatively unimportant part of the trial there may be no risk. The extensiveness and

nature of the closure in this particular case is minimal to the point of *de minimis,* and should qualify as harmless error.

Petitioner has failed to prove that the holding of the Appellate Division with respect to this issue was a decision that was "contrary to or involved an *unreasonable* application of clearly established federal law as determined by the Supreme Court of the United States as required by § 2254(d)(1). Unreasonable, in this context, means more than just technially wrong, as it may be in light of *English.*

Juror Misconduct

Rule 606(b) Federal Rules of Evidence provides in relevant part as follows:

> **Inquiry into the Validity of Verdict or Indictment.**
>
> Upon an inquiry into the validity of a verdict or an indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent from the verdict or indictment or concerning a juror's mental processes in connection therewith.

This provision is Constitutional, and supports important public interests, including the freedom of deliberation, stability and finality of verdicts and protection of jurors against annoyance and embarrassment. *McDonald v. Pless*, 238 U.S. 264 (1915). For purposes of federal *habeas* consideration, this Rule is a bar against what was sought to be done here.

In this case, immediately following the verdict, defense counsel interviewed several jurors in depth. Juror No. 10, Susan Rowe, submitted an affidavit at the Defendant's request asserting that she was a hold out, along with Juror No. 3 for a not guilty verdict, and that a fellow juror. Bill Diamond. Juror No. 6. had then explained to her that he was in the business (of video productions), it was what he does for a living and that he disagreed with the Defense's expert witness, James Sussman. He asserted the opinion that it would be extremely difficult to alter an audiotape and that if it were altered, the splices would be apparent. This expression was contrary to the testimony of Defense expert Sussman at trial and because of Diamond's claim of special expertise in the field, Ms. Rowe say she changed her vote, so as to convict.

The trial court held a CPL 330.30 hearing and rendered a written decision after that hearing, dated August 2, 2004, in which he found, in effect, that the juror was "completely incredible based upon the vague and convoluted nature of [her] testimony and also based upon the numerous glaring inconsistencies contained therein. Ms. Rowe was clearly having second thoughts about her verdict and was attempting to impeach it."

This decision was not based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, within § 2254(b)(2). In any event, the Federal Constitution as reflected in Rule 606 of the Federal Rules of Evidence does not require such a hearing. This contention is not a basis for this Court to grant relief in this case.

The Audiotape

After the Police became informed of the commission of this crime, a state police investigator attempted to get the victim to telephone her father and tape admissions of criminality. It was clear that the first attempted to tape a conversation with Defendant was unsuccessful, because the victim failed to turn the "On" button. The second tape was admittedly incomplete, in that it did not cover the entire conversation. The Court had initially suppressed the second tape but on the eve of trial entertained an application by the prosecutor to authenticate the tape and made a proper foundation for its admissibility.

Defense counsel objected on the ground that the prosecutor had conceded that "tape does not reflect the entire conversation that took place." The tape was eighty-two seconds long and the actual conversation had extended for twenty minutes. The entire conversation could, of course, under traditional Rules of Evidence be testified to by the victim who was one of the participants. Probably to the extent that it was overheard by the state investigator, it could also be testified to by her.

The Court concluded that the victim could testify to authenticate the tape without the necessity of showing that it was the entire conversation and that the tape would then be admissible, and the argument that it was incomplete would go only to the weight rather than admissibility.

On the defense case, expert witness James Sussman testified that the tape had a large number of breaks and had been spliced and altered. The Appellate Division decision on direct appeal issued May 23, 2005, dealt with the tape issue as follows:

> During the trial, the court allowed the People to introduce into evidence an audiotape of a particular telephone conversation between the defendant and the complainant. Contrary to the defendant's contention, the People laid a proper foundation for the admission of the tape into evidence (citation omitted). The fact that there was a minor gap in the tape goes to the weight of the evidence, not its admissibility. (citations omitted)

This decision is not contrary to nor does it involve an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. It is a valid decision based on the New York State Law of Evidence which does not differ materially from the Federal Rules of Evidence in this context. This issue is not a basis to grant the writ.

Appendix B

Ineffective Assistance of Counsel

The ineffective assistance claim is focused on the failure to call Defendant as a witness in his own behalf. Petitioner concedes that he knew that he had the right to take the stand if he wished to do so. It is also claimed that trial counsel did not adequately cross-examine or impeach the victim. No *Sparman* affidavit has been submitted. There was significant cross-examination with respect to motivation and inconsistencies and the long lapse of time before the victim told her mother.

It cannot be said that the exercise of judgment as to the extent of cross-examination of a vulnerable young person under the totality of these circumstances was below the standard required of *Strickland.* No showing is made that any particular element of cross-examination would have altered the outcome of the trial.

Petitioner had admitted to the arresting officers that he had engaged in sexual intercourse with his daughter claiming only that it was consensual, which is an impossibility as a matter of law in light of her age. No prejudice is shown from the failure to cross-examine more extensively nor does it appear on this record that further cross-examination would have altered the outcome of the trial.

Exposing Petitioner to cross-examination as to open issues in the case including the adequacy and authenticity of the tape recording would have been counter-productive. This Court concludes that Defense

counsel's advice that his client not testify represented a reasonable strategy under the circumstances, and while another attorney might have reached a different conclusion, the record does not demonstrate that the actions of this lawyer were so unreasonable as to deny Petitioner the effective assistance of counsel.

The Court does not perceive how any testimony Petitioner could truthfully give would have altered the outcome of the case. Psychiatric records of the victim were highly unlikely to show her inability to recall the events or to perceive and remember them. This is the primary purpose for which psychiatric records of a victim are used in state criminal cases. Thus, the criticism of trial counsel for failing to obtain the confidential records in advance of trial cannot be regarded as inadequate performance in the context of this case.

The denial by the state court of this claim of ineffective assistance of counsel has not been shown to be contrary to or involve an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States, within the meaning of § 2254(d)(1). In the context, as noted earlier "unreasonable" implies more than just being wrong.

This Court has reviewed all the claims made in this proceeding by Petitioner and finds no basis for a Constitutional violation in connection with his conviction and sentence.

Appendix B

The Petition is denied. The Clerk shall file a final judgment. However, because of the large number of significant Constitutional issues which are raised and the fact that reasonable persons could disagree with respect to the total effect of all these issues on the conviction, this Court will issue a Certificate of Appealability extending to all issues raised. Petitioner may continue to proceed *in forma pauperis.*

SO ORDERED.

Dated: White Plains, New York
July 13, 2007

Charles L. Brieant, U.S.D.J.

OPPOSITION BRIEF

(2)

No. 08-1310

FILED
JUN 18 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ROBERT GIBBONS,

Petitioner,

—v.—

RICHARD A. SAVAGE, SUPERINTENDENT
GOWANDA CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did petitioner's claim that the trial court's temporary exclusion of members of the public from the courtroom as a result of the total number of prospective jurors present in the courtroom during the first afternoon of jury selection where nothing of significance happened in the courtroom during that afternoon's proceedings, in light of the deferential standard of review afforded to state court determinations under 28 USC §2254(d)(1), establish a Sixth Amendment violation entitling petitioner to a new trial?

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STATEMENT OF THE CASE

The State Court Proceedings

On November 18, 2003, petitioner Robert Gibbons was convicted in New York State County Court, Orange County, of Rape in the Third Degree under New York Penal Law §130.25(2), Incest under former Penal Law §255.25, and Endangering the Welfare of a Child under Penal Law §260.10(1). These convictions stem from an incident in which petitioner had sexual intercourse with his then fifteen year-old daughter.

At trial, petitioner challenged the victim's credibility. Additionally, through the introduction of expert witness testimony, the defense also claimed that a tape recording of a controlled conversation between the victim and petitioner in which petitioner agreed to see his daughter's therapist regarding his having sex with his daughter might have been altered. Subsequent to his conviction, petitioner also moved to set aside the verdict on the basis of juror misconduct.

On appeal to the State York State Supreme Court, Appellate Division, Second Department, among other claims, petitioner asserted a violation of his Sixth Amendment right to a public trial. Petitioner argued that the trial court erroneously excluded his mother from the initial afternoon of jury selection and that, as a result of that error, he was entitled to a new trial. *See* Brief and Appendix for Defendant-Appellant, Appellate Division, Second Department, at 39-41.

Petitioner also claimed that the trial court erroneously admitted a tape recorded conversation between himself and his daughter and erroneously denied his motion to set aside the verdict as a result of alleged juror misconduct.

The Appellate Division, in affirming the judgment, found that during a portion of the *voir dire*, the trial court found that there was insufficient seating in the courtroom and temporarily excluded the general public and petitioner's mother from the courtroom. In turn, the Appellate Division held that under the circumstances, the court did not deprive petitioner of his right to a public trial. *People v Gibbons*, 18 AD3d 773, 795 NYS2d 700 (2d Dept. 2003). The intermediate appellate court also rejected petitioner's additional claims concerning the admissibility of a tape-recorded conversation and the denial of his motion to set aside the verdict on the grounds of juror misconduct. *Id.* In his application for leave to appeal to the New York Court of Appeals, petitioner again asserted that his right to a public trial had been violated. In making that argument, petitioner primarily focused on the trial court's specific failure to consider alternative seating for his mother rather than on the exclusion of the public as a whole. *See* Letter Application for Leave to the Court of Appeals, at 1-5. The Court of Appeals denied leave on September 28, 2005. *People v Gibbons*, 5 NY3d 828, 804 NYS2d 42, 837 NE2d 742 (2005).

Following his direct appeal, petitioner also moved to vacate judgment, claiming that he was denied effective assistance of counsel. The County

Court summarily denied his post-judgment motion, and leave to appeal was denied by the Appellate Division.

The Federal Court Proceedings

On April 20, 2008, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. Petitioner argued that he was denied his right to a public trial. According to petitioner, there was sufficient room in the trial courtroom to accomplish jury selection and honor his right to a public trial. While referencing the general constitutional guidelines governing courtroom closures under *Waller v Georgia*, 467 US 39 (1984), petitioner also cited New York and federal precedent and asserted that even where the exclusion of the general public is warranted, a defendant's family members must be allowed to remain (Petition for a Writ of Habeas Corpus at 19-20). In effect, petitioner asserted that a stricter constitutional standard applied to the exclusion of family members over members of the general public. Petitioner also argued that harmless error did not apply to his claim (*Id.* at 21). Additionally, petitioner reiterated his other appellate claims and his post-judgment claim of ineffective assistance of counsel.

The state opposed the claim and responded that the right to a public trial is not absolute and that, under state law, the trial court has discretion to administer activities inside the courtroom to prevent overcrowding and to accommodate limited seating. The state also argued that even if the court's actions

constituted a closure, the limited closure during the most preliminary stage of the first afternoon of jury selection was temporary and was too insignificant and trivial to establish a Sixth Amendment violation entitling petitioner to a new trial. In particular, the state argued that the fact that petitioner's mother was excluded from only the most preliminary and initial stage of jury selection when the proceedings were largely ministerial in nature and concerned the prospective jurors' inability to serve, the fact that petitioner did not raise any challenges, including peremptory or for cause, to the prospective jurors at that point in the selection process, and that petitioner's mother was permitted in the courtroom for the remainder of the trial following the first afternoon of jury selection all supported that conclusion, and, therefore, petitioner was not entitled to federal habeas relief. *See* Memorandum of Law in Opposition to Petition, Point I.

The District Court denied the petition. The court in the first instance rejected petitioner's claimed violation of his right to a public trial. While the court observed that it would have been possible to have allowed some members of the public, including the family of defendant to remain in the courtroom, without intermingling with the jurors, "[r]egardless of what might have been, there was really nothing substantive being accomplished in the first day, except for the purging of the panel for generalized excuses. Specifically, no disputed challenges for cause were ruled upon and no peremptory strikes were exercised. Obviously, no testimony was taken." *See* Appendix B

to Petition for a Writ of Certiorari at 28a. The court also indicated that it perceived that the constitutional violation, if any, alleged by petitioner in this case to be "minimal and hyper technical." Thus, the court determined that the extensiveness and nature of the closure in petitioner's case is "minimal to the point of *de minimis*, and should qualify as harmless error." Accordingly, the court held that petitioner had failed to demonstrate that the Appellate Division's determination of this claim was "contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States as required by §2254(d)(1)." *Id.* at 29a-30a. The District Court also rejected petitioner's additional claims. However, the court issued a certificate of appealability as to all issues raised by petitioner.

Petitioner then appealed to the United States Court of Appeals for the Second Circuit. Petitioner restated the same arguments that he raised in the District Court and again claimed that the trial court's closure of the courtroom violated his right to a fair trial and also claimed that he was also entitled to a heightened standard of review because the closure involved a family member as opposed to the general public. Petitioner also argued that neither the state courts nor the federal district court had applied the standards under *Waller*, and that harmless error did not apply to his claim. Brief for Petitioner-Appellant to the Court of Appeals for the Second Circuit at 20-29. Petitioner also restated his other claims. *Id.* at 29-54.

In a thorough and well reasoned decision, the Second Circuit affirmed the District Court's decision, and held that although the closure was not justified, upon an examination of all the details of what occurred, the closure was too trivial to warrant the remedy of nullifying an otherwise properly conducted state court trial. *Gibbons v Savage*, 555 F3d 112 (2d Cir. 2009). The court agreed with petitioner that the closure was governed by *Waller,* and that such a structural error was not subject to harmless error. However, the court noted that it does not necessarily follow that every deprivation of a right considered to be structural constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of the deprivation. *Id*. at 120. In answering its own question as to whether trivial exclusions require overturning a state court conviction, the court considered like situations involving both the denial of the right to counsel and the denial of the right to a public trial, as well as its own precedent in *Peterson v Williams*, 85 F3d 39 (2d Cir.), *cert. denied*, 519 US 878 (1996) (courtroom remained closed during the defendant's testimony) *Id*. at 120-121. The court further examined the specific facts and circumstances surrounding the temporary closure in petitioner's matter and the actual events that transpired during that time. When measured against the values articulated in *Waller*, the court found that the third and fourth sets of values discussed in *Waller* were not implicated during *voir dire* because no witness testified. Additionally, the Court found that in light of the particular facts of petitioner's case,

limiting the presence at the *voir dire* proceedings to only the attorneys, the judge, defendant, and prospective jurors for one afternoon did not subvert the first or second set of values. The court further noted that even if petitioner's mother had not been excluded from the courtroom, she would not have been able to watch a significant portion of what occurred because the private interviews of individual jurors as to their reasons for inability to serve were justifiably conducted in an adjacent room out of the hearing and sight of the other jurors. Furthermore, the court noted that the judge had read the indictment, asked questions of a few jurors, and provided administrative details as to what the jurors should expect if chosen. Additionally, the court noted that no prospective jurors were excused except with the consent of both parties, that no peremptory challenges were made, no objections were asserted by either party and that the next morning, when *voir dire* resumed, petitioner's mother was allowed to watch the proceedings. Accordingly, the court held that the incident was too trivial to warrant a new trial. *Id.* Finally, the court also rejected petitioner's other claims. *Id.* at 121-122.

Petitioner now seeks a writ of certiorari in this Court, limited to the issue of the denial of his right to a public trial. For the reasons that are more fully stated below, further review of this issue is unwarranted.

REASONS FOR DENYING THE WRIT

In this Court, as limited by his petition, petitioner seeks review of his claim that the temporary closure of the courtroom during the initial afternoon of jury selection violated his right to a public trial, and that, as a result of the unjustifiable closure, he is entitled to a new trial. But, in seeking review, although petitioner attempts to present his claim as a question of law, in fact, his claim more properly focuses on the application of the applicable law to the facts of his case. Indeed, petitioner seeks further review on the basis of an assertion of a hyper technical violation of the right to a public trial. Moreover, petitioner does not advance any argument that extends an existing legal principle to a previously undecided question, much less identify any novel legal issue or claim that this Court has not already addressed. *See Waller v Georgia*, 467 US 39 (1984); *Press-Enterprise Company v Superior Court of California, Riverside County*, 464 US 501 (1984) (the guarantees of open public proceedings in criminal trials cover proceedings for the *voir dire* examination of potential jurors). Rather, the essence of his claim is that the lower court misapplied this Court's standards to the specific facts of his case. Because petitioner does not present a legal question of importance or an issue that is likely to recur with great frequency, and because the state court's ruling was not objectively unreasonable, his claim does not warrant this Court's review.

Moreover, as shown below, the Court of Appeals for the Second Circuit correctly applied the law to

petitioner's case. Nothing of particular significance occurred during the part of the session that took place in the courtroom, and in fact, the initial proceedings that afternoon were largely ministerial in nature. The court privately interviewed the individual jurors as to their reasons for being unable to serve in a separate room outside the presence of the other persons in the courtroom, and petitioner took no issue with that aspect of the trial proceedings. The court also read the indictment and other preliminary instructions, asked a few preliminary questions of a few jurors, and provided a brief overview of the administrative details of the proceedings. Additionally, no peremptory or for cause challenges were made, none of the prospective jurors was excused except on consent, the respective attorneys did not ask any questions of any of the prospective jurors at that point in the proceedings, and there were no objections to anything that occurred. Thus, had petitioner's mother been present, she would not have been able to watch a significant portion of what occurred during the afternoon session, and that which did occur in the courtroom was ministerial in nature and did not involve any input from the parties. Finally, the next morning, jury *voir dire* resumed, and the trial court allowed petitioner's mother to be seated in the courtroom. Consequently, the temporary closure, which lasted for only a portion of the initial jury *voir dire* on the first afternoon of jury selection, did not violate petitioner's right to a public trial under *Waller*. Any error was trivial and did not constitute constitutional error or satisfy the high statutory threshold for the issuance of a writ of habeas corpus under 28 USC §2254(d)(1). Thus, the Second Circuit's

decision does not require further review.

A. Petitioner's Claim Presents No Substantial Legal Question Meriting This Court's Review.

In seeking review, petitioner fails to raise a substantial question over the legal standard or rule of law to be applied in his case. In fact, petitioner does not identify any novel legal issue for the Court's consideration, petitioner does not ask the Court to extend existing legal principles to a previously undecided question, and petitioner also does not ask that the Court revisit any area based on a change in the law or any other legal development. Rather, petitioner merely restates his claim that the courtroom closure involved a structural error that is not subject to harmless error analysis and thus results in automatic reversal. As shown below, petitioner's argument is fundamentally flawed.

As a threshold matter, review of petitioner's claim is governed by 28 USC §2254(d)(1), and thus the reviewing court must ask if the state court adjudication on the claim is contrary to or involves an unreasonable application of clearly established federal law. *See Carey v Musladin*, 549 US 70 (2006); *Yarborough v Alvarado*, 541 US 652, 663 (2004). For this reason alone, petitioner's argument fails because petitioner does not demonstrate that the Appellate Division's determination that the temporary exclusion of petitioner's mother, under the limited circumstances that were presented in his case, did not violate petitioner's right to a public trial is objectively

unreasonable. Petitioner's principal contention that an unjustifiable courtroom closure involves a structural error that entitles him to a new trial fails to satisfy his statutory burden for habeas corpus relief and ignores the question of deferential review altogether. *See Williams v Taylor*, 529 US 362, 409-413 (2000) (an incorrect application of federal law was not necessarily an unreasonable application of clearly established Federal Law within the meaning of 28 USC §2254(d)(1)).

In determining whether a state court ruling is objectively unreasonable, the range of reasonable judgment depends, in part, on the nature of the relevant rule. As a general proposition, the more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. *Yarborough*, 541 US at 663-664. Such leeway is consistent with and embodied within 28 USC §2254(d)(1), which affords the state court the ability to adopt reasonable interpretations of this Court's precedent, like the Second Circuit's and other circuit's triviality analysis, on questions that are not directly answered by this Court's decisions and is especially relevant in the area of a temporary closure because the analysis turns on the particular facts. After all, *Waller* and *Press-Enterprise Company* address full, extended closures and not minimal closures. Indeed, in *Press-Enterprise*, the trial court closed the courtroom for all but three days of a six-week *voir dire*. In contrast to those decisions, this Court has not specifically addressed minimal or trivial closures, and along the same lines, has never specifically defined at what point

such a minimal courtroom closure during jury selection deprives a defendant of his right to a public trial. However, in the absence of such a specific ruling, in an analogous situation, this Court appears to have applied something that is akin to a triviality standard in *Perry v Leeke*, 488 US 272, 280 (1989) (order barring attorney-client communications during a fifteen minute break in the defendant's trial testimony did not raise the same constitutional concerns as the overnight ban). Consequently, the Appellate Division's application of a standard similar to triviality followed by the Second Circuit and other circuits and its conclusion that the minimal intrusion on petitioner's right to a public trial did not rise to the level of a constitutional violation requiring reversal of the judgment was not inconsistent with either *Waller* or *Press-Enterprise Company* and therefore was also not objectively unreasonable.

Second, on the question of the appropriate legal standard, the Court of Appeals for the Second Circuit agreed with petitioner that the exclusion of his motion during the initial portion of the jury selection proceedings constituted a closure within the meaning of the Sixth Amendment, that the closure was not justified, that under *Waller* the denial of a public trial is among the category of errors that is identified as a structural error, and thus harmless error analysis does not apply. *Gibbons*, 555 F3d at 116-120. What the Court of Appeals did take issue with, however, was petitioner's unqualified assertion that he was entitled to reversal of the judgment, regardless of the particular facts and circumstances that transpired in his case. To

that end, the court explained that, "[i]t does not necessarily follow, however, that every deprivation in a category considered to be 'structural' constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation" *Id.* at 120. The Court then went on to find that the temporary closure in petitioner's trial was trivial and did not result in a constitutional deprivation requiring reversal. Furthermore, petitioner's assertion that he is entitled to reversal in all circumstances is itself inconsistent with *Perry*. Consequently, no matter how petitioner attempts to couch his argument, he primarily claims that the Second Circuit misapplied existing law to the particular facts of his case.

To be sure, this Court's rules make clear that "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. This is because such arguments do little more than present "fact-bound issue[s] of little importance since similar situations are unlikely to arise with any regularity." *Massachusetts v Sheppard*, 468 US 981, 988 n.5 (1984). Notwithstanding petitioner's attempt to take issue with the court's determination that the incident was too trivial to justify reversal of his conviction, petitioner cannot escape the fact that, no matter how he presents his argument, his claim is essentially a factually based claim that has only limited applicability to other situations involving temporary

and only incidental closures, which by their very nature, are based on facts that are peculiar to the particular case. Indeed, petitioner makes no showing to the contrary. Nor does he demonstrate the potential widespread significance of his particular claim, and for this additional reason, review of his claim would, therefore, shed little, if any, light on the law concerning temporary courtroom closures or the particular analysis to be applied to such closures in light of *Waller*.

Third, petitioner's analysis of the Second Circuit's determination that the error in his matter was too trivial to require reversal and his additional reasons for granting review of his claim offers nothing more than the conclusory assertion that "the untenable distinction between 'harmless error' and 'trivial error' is really no distinction at all ...." Petition at 11. Merely calling an error a structural error does not resolve the question of whether a trivial transgression of a right amounts to a constitutional deprivation of that right. In fact, the analysis is not only well reasoned, but the Second Circuit correctly applied the law to the facts of petitioner's case.

In affirming the District Court's judgment, the Second Circuit firmly recognized that traditional harmless error analysis does not apply to structural errors. *Gibbons*, 555 F3d at 119-120; *see also Carson v Fischer*, 421 F3d 83, 94-95 (2d Cir. 2005). However, the Court also recognized that not every error or deprivation in a category considered to be structural constitutes a violation of the Constitution or requires

reversal of the conviction. *Gibbons*, 555 F3d at 119-120; *see Brown v Kuhlman*, 142 F3d 529, 540 (2d Cir. 1998); *Yarborough v Keane*, 101 F3d 894, 897 (2d Cir. 1996) (exemption from harmless error does not mean that any violation of the same constitutional right is a 'structural defect' regardless whether the error is significant or trivial). In other words, consistent with this Court's holding that the Constitution only guarantees a criminal defendant the right to a fair trial and not a perfect trial, *United States v Hastings*, 461 US 499, 508 (1983); *see also Ellis v United States*, 313 F3d 636, 653 (1st Cir. 2002), and this Court's holding in *Perry v Leeke*, 488 US 272, 280 (1989) that an order barring attorney-client communications during a fifteen minute break in the defendant's trial testimony did not raise the same constitutional concerns as the overnight ban in *Geders v United States*, 425 US 80 (1976), the Second Circuit has held that, although the error alleged involves a structural defect, in certain limited circumstances, the violation or deprivations are hyper technical or are too trivial to constitute a constitutional violation or require automatic reversal. Such an analysis has been applied in the context of the denial of the right to a public trial as well as to temporary bans on attorney-defendant communications. *See Gibbons*, 555 F3d at 120-121; *Peterson v Williams*, 85 F3d 39, 41-44 (2d Cir. 1996), *cert. denied*, 519 US 878; *Carson v Fisher*, 421 F3d at 94-95; *United States v Triumph Capital Group, Inc.*, 487 F3d 124, 134-137 (2d Cir. 2007); *Smith v Hollins*, 448 F3d 533, 540 (2d Cir. 2006). As explained by the Second Circuit, a finding that an unjustified closure is too trivial to amount to a constitutional violation of the

Sixth Amendment is "very different" from a harmless error inquiry. "Whereas a harmless error inquiry looks to whether the defendant suffered 'prejudice' or 'specific injury,' a triviality inquiry asks "whether the actions of the court and the effect that they had on the conduct of the trial deprived defendant -whether otherwise innocent or guilty- of the protections conferred by the Sixth Amendment." *Carson v Fischer*, 421 F3d at 94; *Peterson v Williams*, 85 F3d at 42; *see also United States v Triumph Capital Group, Inc.*, 487 F3d at 134-135.

Furthermore, the distinction between harmless error analysis and a triviality inquiry "is not semantical." *Carson v Fischer*, 421 F3d at 94. Unlike in the case of harmless error, the court is not focused on whether the defendant would have been convicted without the error or was prejudiced in some other way. Instead, the court considers whether the error is significant enough to rise to the level of a constitutional violation. *Id.*; *see also*, *Gibbons*, 555 F3d at 120-121. In effect, the analysis turns on whether the action or conduct at issue "subverts the values the drafters of the Sixth Amendment sought to protect" *Smith v Hollins*, 448 F3d at 540; *see Gibbons*, 555 F3d at 121; *Brown v Kuhlman*. 142 F3d at 540 (court looks not only to the right violated, but also at the particular nature, context, and significance of the violation). Thus, contrary to petitioner's assertion, there is a meaningful distinction between harmless error analysis and a finding that an error, although asserted as a structural error, is too trivial or minor to rise to the level of a constitutional deprivation. This is

precisely the same distinction that was recognized by this Court in *Perry*, where the Court admitted that the line between *Geders* and *Perry* was "thin one," but nevertheless was one of a "constitutional dimension" *Perry v Leeke*, 488 US at 280; *see Sherman v Smith*, 89 F3d 1134, 1152 (4th Cir. 1996) (Ervin, J., dissenting). Therefore, far from ignoring established precedent, the Appellate Division and the Second Circuit followed well established precedent and employed the same distinction that this Court applied in *Perry*. Simply put, one circumstance rises to a constitutional deprivation while a second situation of considerably lesser degree involving the same alleged structural error does not. While unusual, the result is not unprecedented. *See Sherman v Smith*, 89 F3d at 1152.

Moreover, in affirming the District Court's judgment, the Second Circuit correctly applied the law to the facts of petitioner's case. Preliminarily, the Court applied the correct standard of review as required under 28 USC §2254(d)(1). To be sure, petitioner virtually ignores 28 USC §2254(d)(1) and offers no analysis as to why the Appellate Division's determination is objectively unreasonable. Second, the Court considered whether the temporary closure violated petitioner's right to a public trial in light of *Waller*. The Court concluded that the temporary closure was trivial and did not offend the values that underlie the right to a public trial. *Gibbons*, 555 F3d at 121 *citing Waller*, 467 US at 46-47. No witnesses testified during the jury selection phase, and the closure also did not subvert petitioner's right to a fair trial or the prosecution's and judge's responsibilities to

the accused. Most importantly, even if petitioner's mother had not been excluded from the proceedings, she would not have been able to view a significant portion of what occurred during the afternoon session because the trial court individually interviewed the prospective jurors who voiced generalized conflicts in a separate room and outside of the presence of the other prospective jurors. Petitioner did not raise any objection to that aspect of the proceedings, and he has never claimed in any proceeding that the private interviews of the jurors as to their reasons for being unable to serve separately violated his right to a public trial. Additionally, the potential jurors who were excused after privately voicing their reasons were excused on consent. Because of those circumstances, petitioner is especially hard-pressed to claim the denial of his right to a public trial. Only in the most hyper technical sense can petitioner claim that his right to a public trial encompasses the right to have the public present during a portion of the proceedings when nothing took place in the courtroom at all.

Furthermore, nothing of significance happened during the part of the session that was held in the courtroom. As the Second Circuit noted, the judge read the indictment, asked a series of questions of a few jurors, and provided administrative details regarding jury service. *Gibbons*, 555 F3d at 121. Additionally, the parties did not exercise any peremptory challenges or raise any for cause challenges to the prospective jurors. The parties also did not raise any objections to what occurred. Finally, when the *voir dire* continued the next morning, the trial judge permitted petitioner's

mother to be in the courtroom and watch the proceedings. In sum, the closure occurred during the most preliminary portion of jury selection when the proceedings were largely ministerial in nature, during a period of time when a significant portion of the session was held in private with only the judge, the parties, and the individual prospective jurors present, and also at a point during the *voir dire* when the defense had little, if no, input in the proceedings. Moreover, the afternoon session in question lasted, at most, only a couple of hours. The Second Circuit therefore correctly concluded that although the closure was not justified, the event was too trivial to nullify an otherwise properly conducted state court criminal trial. *Id.* For these reasons, and because the event that occurred at petitioner's trial was trivial and was demonstrably and categorically different, both in duration and in scope, from the circumstances present in other instances that resulted in the denial of the right to a public trial, *compare Press-Enterprise Company*, 464 US 501 (trial court could not constitutionally close all but three days of six weeks of jury selection), the Second Circuit correctly determined that the exclusion of petitioner's mother from the first afternoon of jury selection did not require that petitioner's state court conviction be overturned. For the same reasons, the Appellate Division's determination is not objectively unreasonable.

B. The Additional Grounds Cited By Petitioner Are Also Insufficient To Warrant Further Review By This Court.

Petitioner also claims that the decision in *Gibbons* has created a split between the First and Second Circuits, citing the First Circuit's decision in *Owens v United States*, 483 F3d 48 (1st Cir. 2007). This additional basis for review fails for several reasons.

First, contrary to petitioner's contention, the First Circuit did not reject the notion that a temporary courtroom closure might be trivial to constitute a violation of the Sixth amendment and therefore a defendant would be entitled to automatic reversal of the conviction without regard to the nature and extent of the closure as a matter of law. Rather, based on the circumstances that were alleged to have been present at *Owens* trial, the Court distinguished Owens' matter from other instances in which the error had been found to be trivial. The Court observed that this was not a mere fifteen or twenty-minute closure. Rather, Owens had alleged that the trial had been closed to the public for an entire day while jury selection proceeded. *Id.* at 62-63. Consequently, the First Circuit remanded the matter back to the District Court to determine to hold a hearing to determine both the nature and extent of the closure. *Id.* at 66; *see also Owens v United States*, 517 F Supp.2d 570, 574 (D. Mass. 2007). Nowhere did the First Circuit expressly reject the application of a triviality inquiry as being inconsistent with this Court's holdings. Instead, the Court concluded that without the benefit of an evidentiary hearing to determine the nature and extent of the trial closure, it was improvident for the District Court to determine whether the trial was actually closed. *Owens*, 483 F3d at 70. Thus, in the first instance, not only does

petitioner fail to demonstrate that the First Circuit has rejected a triviality inquiry outright, but petitioner relies on *dicta* rather than on the actual holding of the *Owens* decision.

Of similar note, petitioner misstates the significance of the Court's statement that once a defendant demonstrates a violation of his Sixth Amendment right to a public trial, he is entitled to relief. Once again, the Court did not reject, explicitly or implicitly, the Second Circuit's precedent involving triviality. Second, the statement is taken out of context. In fact, the Court responded to the Government's suggestion that the Court determine whether the trial closure was prejudicial. In its proper context, the court's reply that once a defendant demonstrates a violation of his Sixth Amendment right to a public trial, he need not show prejudice simply restated that harmless error analysis does not apply. Because *Gibbons* did not apply harmless error analysis, petitioner's reliance on that language in *Owens* adds nothing to his argument. Additionally, from a legal standpoint, petitioner's decision is consistent with *Owens* because *Owens* remanded the matter back to the District Court to determine both the nature and the extent of the closure before the court could properly determine whether there had been a violation of the defendant's right to a public trial. Such an inquiry, at the very least, implicitly recognized that certain circumstances could exist where the nature and the extent of a closure would be too trivial or insignificant to find a Sixth Amendment violation. Also, *Owens* recognized that owing to the size of a courtroom, a

courtroom might need to be initially cleared of spectators, but that once prospective jurors had left the courtroom, the court's interest is closing the courtroom dissipates. *Owens*, 483 F3d at 62. Of course, that factual scenario is substantially similar to what took place at petitioner's trial, and in contrast to *Owens*, petitioner's mother was admitted after seating became available and thereafter was present for the remainder of the jury selection.

Furthermore, *Owens* is factually distinguishable from petitioner's matter. On remand, the District Court determined that after jurors were excused and space had become available, the court security personnel had continued to bar the parties from entering the courtroom for the rest of the day and that the entire jury was selected that day. *Owens*, 517 F Supp 2d at 574. Thus, not only does *Owens* differ in terms of the length of the closure, but, more fundamentally, it differs in scope because the courtroom remained closed for the entire jury selection and therefore for the public questioning of prospective jurors as well as for any challenges raised by the parties. In contrast, none of those events occurred during the closure in petitioner's matter, petitioner's mother was excluded for one afternoon of the first day of jury selection, and during that time, the most significant events occurred outside the courtroom when the court privately interviewed the prospective jurors regarding their individualized reasons for being unable to serve. These distinctions also demonstrate that the results in the two different cases are factually based, and therefore, petitioner's argument turns on a

misapplication of the law to the peculiar facts of his case as opposed to the use of an erroneous standard of law.

Additionally, petitioner completely ignores the fact that Second Circuit's analysis involving trivial error is followed by many of the other circuit courts. Among the other circuits that have followed the Second Circuit's decisions considering trivial error include the Ninth Circuit, *see United States v Ivester*, 316 F3d 955, 959-960 (9th Cir. 2003) (district court's exclusion of the spectators during brief mid-trial questioning of jurors was so trivial as to not implicate defendant's sixth Amendment rights), the Seventh Circuit, *Braun v Powell*, 227 F3d 908, 919 (7th Cir. 2000), *cert. denied*, 531 US 1182 (2001) exclusion of single excused juror from trial did not implicate the right to a public trial), Tenth Circuit, *United States v Al-Smadi*, 15 F3d 153, 154-155 (10th Cir. 1994), and the District of Columbia, *United States v Perry*, 479 F3d 885, 889-891 (D.C. Cir. 2007) (applying triviality standard to conclude that exclusion of defendant's eight-year old son did not violate the Sixth Amendment). The Fourth Circuit, too, recognizes that in certain situations the exclusion of a member of the public can be too trivial to amount to a violation of the Sixth Amendment. *See United States v Izac*, 239 Fed Appx 1 (4th Cir. 2007); *see also Sherman v Smith*, 89 F3d at 1152 (Ervin, J., dissenting). Likewise, even lower courts in the First Circuit have applied a similar analysis. *See United States v Ahern*, 04-Cv-474SM, 2005 WL 1074279 (D. NH, April 29, 2005). Thus, the weight of existing authority does not support petitioner's claim that his decision has created a split of authority among the

circuits.

Finally, this Court has declined review of those rulings in which the claimed error regarding a courtroom closure was found to be too trivial to constitute a Sixth Amendment violation. *See Peterson*, 85 F3d 39, *cert. denied*, 519 US 878; *Braun v Powell*, 227 F3d 908, *cert. denied*, 531 US 1182. More recently, this Court also declined review of a claim involving a limited ban on attorney communications with the defendant in which the New York State Court of Appeals followed the Second Circuit's decision in *United States v Triumph Capital Group, Inc.*, 487 F3d 124 and applied the triviality analysis. *See People v Umali*, 10 NY3d 417, 859 NYS2d 104, 888 NE2d 1046 (2008), *reargument denied*, 11 NY3d 744, 864 NYS2d 386, 894 NE2d 651; *cert. denied*, __ US __, 129 S.Ct. 1595 (2009). While not considered precedent, the fact that the Court has declined review of very similar types of claims is reflective of the absence of a dispute over the applicable constitutional standards and analysis governing structural errors involving the Sixth Amendment as well as the fact that the decisions in those cases, like petitioner's, turn on the peculiar facts of the individual cases.

For all of these reasons, petitioner's argument that his decision has created a split among the circuits over the applicable legal standards of review is meritless, and his claim presents no substantial legal issue for this Court's review.

CONCLUSION

The issue raised by petitioner presents no legal question of importance for this Court's review, but raises at most a question of misapplication of an existing standard to the narrow facts of this case. Moreover, petitioner fails to show that the state court's ruling is objectively unreasonable. For these reasons, and because the Second Circuit's decision was correct and eminently fair, a writ of certiorari should be denied.

Respectfully submitted,

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